IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 00-5212, 5213

MICROSOFT CORPORATION,

Defendant-Appellant,

v.

UNITED STATES OF AMERICA and STATE OF NEW YORK, *et al*.,

Plaintiff-Appellees.

ON APPEAL FROM THE UNITED STATES OF DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPLY TO MICROSOFT'S RESPONSE TO MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to the Court's Order of October 26, 2000, the Project to Promote Competition & Innovation in the Digital Age ("ProComp") replies to Microsoft Corporation's ("Microsoft") response to ProComp's motion for leave to file a brief in this case as amicus curiae.

Under Fed. R. App. P. 29(b), a motion for leave to file an amicus brief shall state the movant's interest and the reasons why an amicus brief is desirable. In its response to ProComp's motion, Microsoft has not challenged the fact that ProComp has a unique interest in this case. Nor does Microsoft assert that a brief from ProComp would not be useful to this Court. Microsoft simply attacks some ProComp members for competing against Microsoft and states that there is no reason why ProComp cannot coordinate its efforts with other trade associations wishing to file amicus briefs.

ProComp, similar to the Computer & Communications Industry Association ("CCIA") and Software and Information Industry Association ("SIIA"), has a strong familiarity with the marketplace realities and how Microsoft's actions impact the business environment. Microsoft does not deny this fact. ProComp also has a unique legal expertise regarding some of the issues presented to this Court. In particular, without dismissing the importance of the claims under Section 1 of the Sherman Act, ProComp will concentrate on monopoly maintenance issues brought under Section 2 of the Sherman Act. If allowed to file a brief, ProComp will distinguish the economic realities of different forms of predation and how Supreme Court precedent treats these different forms of predation.

For example, it is worth noting the fallacy of Microsoft's argument with respect to predatory pricing because that argument advances a rationale said to be applicable to all of Microsoft's behavior. Relying on *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 589 (1986) and *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), Microsoft has argued that predation is rarely tried and is even more rarely successful.

A competitor wishing to gain a monopoly by predatory price-cutting must expand output to drive the market price down and must capture a very high market share. This means, where marginal costs are rising, that he will be selling very large volumes at a price well below marginal cost, thus incurring substantial losses. The intended victim, however, need not expand output and may contract it so that he either suffers no loss or suffers a loss not only smaller than that absorbed by the predator but one that is even proportionally smaller. The predator uses up his financial reserves much faster than does his victim, thus illustrating why this strategy is seldom tried and even more rarely successful.

This analysis does not apply when, as in Microsoft's case, the predator need not operate at ever higher marginal costs. Microsoft concedes that the marginal cost of increasing browser output does not increase its marginal costs, which are constant. (The cost curve is flat.) The Supreme Court accepts the likelihood that predation will succeed if the predator and the victim must spend equal or nearly

equal sums in waging war. Three cases illustrate the point: *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965); *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972); and *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), and 417 U.S. 901 (1974).

Microsoft has argued further that the prospect of recouping losses sustained during a monopolizing campaign is an essential element of a violation and that Microsoft did not recoup. Microsoft misunderstands the law and economics of this case. A competitor seeking monopoly through predation must, if the predator is rational, have reasonable expectations that, when rivals are driven from the market, it will be able to raise prices sufficiently to recover the full amount of the money spent in the struggle plus a supracompetitive profit. *Matsushita* and *Brooke Group* correctly found that the prospects of such recoupment ranged from highly improbable to impossible.

That reasoning has no application to an incumbent monopolist, such as Microsoft, that seeks to repel potential competitors in order to maintain its monopoly rather than gain a new one. Microsoft sought to dominate the browser market not to gain a new monopoly profit but to prevent the appearance of a substitute for its operating system monopoly. It succeeded but could not raise prices above the monopoly level. What it could and did do was to preserve its

existing monopoly. That is worth the cost of predation even if the delay in the onset of rivalry is only temporary. That is not recoupment in the usual sense, but it is monopolization in violation of Section 2 of the Sherman Act. *Walker Process Equipment*, *Trucking Unlimited*, and *Otter Tail Power* provide examples both of the tactic and its illegality. This form of predation is particularly effective where the monopoly-predator need not outspend the potential rival and has financial resources far greater than that rival. Both of those conditions were met in the case of Microsoft's attack on Netscape.

ProComp, and its counsel, have been studying these legal and economic issues regarding different forms of predation since the filing of the complaint in this case. ProComp's expertise in these issues, coupled with its strong familiarity with the business realities, will provide this Court with valuable analyses of Microsoft's practices.

As SIIA correctly points out, the details of the brief by any amici will, of course, depend to a significant degree on the arguments advanced in Microsoft's opening brief. However, to the extent practicable, ProComp will cooperate with other amici and the appellees to avoid duplicative briefing of issues.

For the foregoing reasons, the Motion for Leave to File Brief As Amicus Curiae should be granted.

Dated: October 31, 2000

Respectfully submitted,

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